STATE OF ILLINOIS

ILLINOIS COMMERCE COMMISSION

ILLINOIS POWER AGENCY Petition for Approval of the 220 ILCS 5/16-111.5(d) Procurement Plan	: : : :	**Docket No. 10-0563**

STAFF OF THE ILLINOIS COMMERCE COMMISSION REPLY BRIEF ON EXCEPTIONS

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The Staff of the Illinois Commerce Commission ("Staff"), by and through its counsel, and pursuant to Section 200.830 of the Commission's Rules of Practice (83 Ill. Adm. Code 200.830), respectfully submits its Reply Brief on Exceptions ("RBOE") in the above-captioned matter.

I. BACKGROUND

On September 29, 2010, the Illinois Power Agency's ("IPA") filed its Final Power Procurement Plan ("Plan") to the Illinois Commerce Commission ("Commission"), thereby initiating this docket. On October 4, pursuant to Section 16-111.5(d)(3) of the Public Utilities Act ("PUA") and an October 1, 2010 ruling by the administrative law judge ("ALJ"), Staff, Iberdrola Renewables, Inc. ("Iberdrola" or "IBR"), the Retail Energy Supply Association ("RESA"), Constellation Energy Commodities Group ("Constellation"), Wind on the Wires ("WOW"), Commonwealth Edison Company ("ComEd"), Ameren Illinois Company ("Ameren"), and Duke Energy Generation Services Holding Company ("Duke") filed Comments and Objections to the Plan. On October 18, 2010, pursuant to the October 7, 2010 Notice of Commission Action and Notice of ALJ Ruling, responses to

objections were filed by the Staff, IPA, Constellation, WOW, ComEd, Ameren, and the Natural Resources Defense Council ("NRDC"). A subsequent filing by IBR on November 10, 2010, permitted by a later ALJ ruling led to further responses and replies by the various parties.

On November 22, 2010, the ALJ issued a Proposed Order ("ALJPO"). Pursuant to the ALJ's Order, Briefs on Exception ("BOE") were filed by December 1, 2010. Staff, WOW, NRDC and the Environmental Law and Poverty Center ("ELPC"), ComEd, the IPA, the Illinois Competitive Energy Association ("ICEA"),[1] Ameren, RESA, Exelon Generation Company, and the People of the State of Illinois ("AG")[2] filed BOEs. The lack of a reply by Staff to a particular exception filed by a party or parties should not be construed to mean that Staff agrees with the exception. In those instances where no reply is provided in this RBOE, Staff stands by the positions taken in its prior filings in this docket. Staff's RBOE follows.

II. ARGUMENT

A. The Commission is not required under the law to give the IPA deference.

The AG states that the Commission should review whether the IPA's Plan is reasonable under the PUA and IPA Act,[3] and defer to the IPA's interpretation of the IPA Act provided it is consistent with the statute and not an abuse of discretion. (AG BOE, at 6) The AG calls for the Commission to give "substantial deference to the IPA's

[1] ICEA intervened in this matter on November 30, 2010. Its petition was granted on December 2, 2010.

[2] The AG intervened in this matter on November 30, 2010. Its petition was granted on December 2, 2010.

[3] Although not explicitly stated, Staff interprets the statement by the AG that the "IPA is entitled to substantial deference in its interpretation and application of the IPA and the statutes it is charged to implement" to mean not only the IPA Act but also related sections from the PUA such as 16-111.5.

interpretation of the IPA Act and the procurement plans that it is charged with both designing and implementing." (AG BOE, at 7) Citing *Milkowski v. Dept. of Labor,* the AG claims that the ALJPO "effectively conducts a *de novo* review of the Plan, failing to defer to the IPA as the agency charged with administering the IPA Act and the procurement process, and it substitutes its interpretation of both Section 16-111.5 and the IPA Act for that of the agency." (AG BOE, at 7-8, citing *Milkowski v. Dept. of Labor,* 82 Ill. App.3d 220, 222 (1st Dist. 1980)) Finally, the AG states that the Commission's Final Order in this docket should detail the standard of review applicable to the IPA's procurement plans which should defer to the IPA's interpretation of the statutes, only ensuring that the plan provides "adequate, reliable, affordable, efficient, and environmentally sustainable electric service at the lower total cost over time, taking into account any benefits of price stability." 220 ILCS 5/16-111.5(d)(3) & (4). According to the AG, the Plan should "only be modified if the Commission finds that the IPA abused it's discretion and its Plan will not further the goal" stated in Section 16-111.5(d)(3) & (4). (AG BOE, at 8-9)

While Staff agrees that the Commission's review of the Plan is described in Section 16-111.5 of the PUA, it disagrees with the AG's conclusion that the IPA should be awarded "substantial deference." Nothing in the PUA or the IPA Act indicates that the IPA should be given "substantial deference," or that the Commission's review is merely to determine whether the IPA abused its discretion. The statute clearly states that "the Commission shall enter its order confirming ***or modifying*** the procurement plan within 90 days after the filing of the procurement plan by the Illinois Power Agency," indicating that the Commission can alter the plan should it not comply with Section 16-111.5(d). (220 ILCS 5/16-111.5(d)(3) (emphasis added)) There are no conditions on what the Commission can or cannot modify, merely a requirement that the Commission

reasonably determine that the plan "will ensure adequate, reliable, affordable, efficient, and environmentally sustainable electric service at the lowest total cost over time, taking into account any benefits of price stability." *Id.* In Staff's view, the Commission's ability to modify the Plan is unconditional, contrary to the AG's argument.

Furthermore, a review of the prior Commission Orders concerning IPA procurement plans shows that the AG's proposal is contrary to how the Commission has reviewed the IPA's Plan in the past. The IPA's interpretation of the IPA Act, and this proposal is even contrary to the AG's own position taken in one of the previous procurement dockets. For example, in Docket No. 08-0519, there was an issue between Staff and the IPA on the interpretation of Section 5/16-111.5(h) of the PUA concerning the release of certain information to the public. The IPA and Staff had opposing views on the interpretation of Section 5/16/111.5. (Docket No. 08-0519, Order at 67 "*According to the IPA, Staff's proposal ignores the strict terms of Section 16-111.5(h), and would create a presumption of disclosing information that is required to be maintained as confidential under Section 16-111.5(h), without any party having to demonstrate the need to have this information disclosed.*") In Docket No. 08-0519, the AG supported Staff's interpretation and made no argument as it does now that the IPA's interpretation of the law was entitled to "substantial deference." (Docket No. 08-0519, Order at 69) In its Final Order, the Commission gave no deference to the IPA's interpretation of the law when the Commission rejected the IPA's interpretation and concurred with Staff's, ComEd's and the AG's interpretation of the statute. (Id., at 70) This review of the order clearly shows no deference was given to the IPA's interpretation of the law.

Another example of the Commission providing no deference to an IPA proposal in its procurement plan can be found in last year's procurement docket, Docket No. 09-

0373. The IPA proposed as part of its original procurement plan that the IPA acquire long-term renewable resources. (Docket No. 09-0373, Order at 39) The IPA's original long term renewable proposal was given no deference by the Commission when the Commission stated that "the proposal in the IPA's September 30, 2009 Plan regarding the procurement of long-term renewable resources, while well intended, was vague and, as several parties pointed out, potentially problematic." (Docket No. 09-0373, Order at 115) In addition, Appendix K, which was subsequently offered by the IPA and eventually was approved by the Commission, was not approved until a careful review and analysis by the Commission of Appendix K in its Order. (Id., at 115-120)

A final example of the Commission giving no deference to the IPA can also be found in Docket No. 09-0373 when the Commission rejected the IPA's proposal to procure demand response. In particular, the IPA recommended that:

> … Demand Response Procurement be specified as a bid alternate in the spring 2010 solicitation for capacity. In the event that Demand Response providers do not exist or do not participate in the spring solicitation, the IPA proposes that a secondary solicitation will be conducted in the fall of 2010; the second event would seek to establish capacity contracts that will encourage the development of demand response programs within the AIU and ComEd service territory. IPA Plan at 38, 52.
>
> As discussed below, one of the issues in dispute is whether the IPA should be permitted to supplement the demand response currently acquired for ComEd, through the PJM RPM auction, with the IPA‟s own independent demand response acquisition event targeted more specifically at ComEd's eligible retail customers.

(Docket No. 09-0373, Order at 128)

To support its proposal, the IPA argued that "[s]ection 16-111.5(b)(3)(ii) of the PUA requires the Plan to include a mix of demand response products where the cost of the demand response is lower than procuring comparable capacity products. According to the IPA, these demand response products are to be procured from eligible retail

customers." (Id., at 129) Staff disagreed with the IPA's interpretation of Section 16-111.5(b)(3)(ii) as did ComEd. (Id., at 136) The Commission, after much deliberation, rejected the IPA's proposal on this issue giving no deference to the IPA. ("Any demand response measures outside of the PJM RPM process would be additive to ratepayer bills due to the RPM construct of obligating capacity resources 3 years in advance. The Commission deems this element of the IPA Plan to be vague and unviable.") (Id., at 153)

Because the Commission is not required to give substantial deference or any deference to the IPA's procurement plan, Staff recommends that the Post Exceptions Proposed Order exclude the AG's proposed language.

B. Energy Efficiency Measures (VII., B.)

The ALJPO agreed with Staff, ComEd, and Ameren, that the IPA's proposal to treat Energy Efficiency as Alternative Resource ("EEAR") to be procured under the 2011 IPA Plan exceeds the IPA's authority under the IPA Act and the PUA. (ALJPO, at 41) The IPA, AG, and ELPC/NRDC all take exception to the ALJPO on this issue. (IPA BOE, at 4-9; AG BOE, at 10-18; ELPC/NRDC BOE, at 1-6) The Commission should reject the IPA's, AG's, ELPC's and NRDC's arguments and exceptions on this issue. As discussed previously in this brief, the Commission is not bound by the IPA's interpretation of statutory provisions under the IPA Act or PUA. Despite the claim or suggestion by the parties that their interpretations are reasonable interpretations of unclear or ambiguous statutes (ELPC/NRDC BOE, at 2; AG BOE, at 14) the law is not unclear or ambiguous and the interpretations offered by the IPA, AG and ELPC/NRDC are fundamentally flawed given that they are not supported by the plain language of the statute.

As Staff set forth in its Response and Objections to the IPA's Plan, pursuant to Section 5/16-111.5(d)(2) of the PUA, the portfolio of products to be included in the IPA's Plan is limited to demand response products and power and energy products (220 ILCS 5/16-111.5(d)(2)) and Section 1-75(a) of the IPA Act provides that procurement plans are to be in compliance with Section 16-111.5 of the PUA. Clearly, energy efficiency products are not listed as a product that is allowed to be purchased by the IPA. (Staff Response and Objections, at 6) Ameren made the same basic argument as Staff in its comments and objections to the Plan. (Ameren Comments and Objections, at 2) In addition, as argued by ComEd in its objections to the Plan, the principle of of *expressio unius est exclusio alterius* supports the rejection of the IPA's EEAR proposal. In its objections, ComEd pointed out the fact that legislature revised the PUA in 2009 to require the IPA's Plan to include capacity related to demand response resources as a product to be procured by the IPA but did not revise the PUA to include EEAR is a clear indication that the legislature did not authorize the IPA to procure EEAR as a product for the procurement plan. (ComEd Objections, at 4) As ComEd argued and to which Staff agrees, under the principal of *expressio unius est exclusio alterius* where a statute provides for one thing and not another, "omissions should be understood to be exclusions." (Id., at 4-5; Staff Reply to Responses to Objections, at 4) For these reasons, alone the Commission should reject the IPA's, AG's and ELPC/NRDC's exceptions and accept the ALJPO's position on this issue. Staff's reply to specific statutory arguments made by the IPA, AG and ELPC/NRDC in their BOEs follows.

ELPC/NRDC argue that because subsection (7) of the Legislative declarations and findings section of the IPA Act states, that "Energy efficiency, demand-response measures, and renewable resources are resources currently underused in Illinois," that

means that the "legislature thought the IPA should consider efficiency options in its procurement." (ELPC/NRDC BOE, at 3) However, as noted by the ALJPO, ComEd pointed out in its filings that preambles are statements of general policy and do not authorize any action. (*Monarch Gas Co. v. Illinois Commerce Commission*, 261 Ill.App.3d 94 (1994), ALJPO, at 34) As discussed previously in this RBOE, no such specific authority is set forth in the IPA Act or the PUA. ELPC/NRDC argue that because energy efficiency is defined not only in the PUA but also define in the IPA Act that also indicates the legislature intended for the IPA "to procure efficiency" for electric utilities. (ELPC/NRDC BOE, at 3) Following that logic, since the definition for energy efficiency under the IPA Act includes gas efficiency ("Energy efficiency" means measures that reduce the amount of electricity or natural gas required to achieve a given end use. 20 ILCS 3855/1-10.), ELPC/NRDC's argument would then suggest that the IPA should also be procuring in its procurement plan not only energy efficiency for the electric utilities but also energy efficiency for the gas utilities. However, no such authority exists and no party has suggested that the IPA should be making procurements on behalf of the gas utilities in its yearly procurement plans. ELPC/NRDC also argue that the ALJPO and the utilities ignore the language in Section 16-111.5(b)[3](vii) which requires the IPA plan to assess "timeframes for securing products or services." (ELPC/NRDC BOE, at 3) ELPC/NRDC argue that this language is an acknowledgement that products or services such as energy efficiency can substitute for supply-side reserves. *Id.* ELPC/NRCD have interpreted "services" here incorrectly by concluding that it must mean something other than supply services. The reference to "services" is a reference to "ancillary services"[4] a

[4] Ancillary service is an industry term and FERC term that refers to various electric supply-related services provided to Regional Transmission Organizations ("RTOs").

term which appears several times in Section 16-111.5.[5] With that correct understanding of the term services, ELPC/NRDC's argument must fail.

Both the IPA and ELPC/NRDC make unpersuasive arguments that Section 3855/1-125 either on its own or coupled together with Section 8-103(i) of the PUA provide authority for the IPA to procure energy efficiency measures as part of its annual procurement plan. The IPA argues that the fact that the legislature requires the IPA to annually report to the Governor and the General Assembly identifying "the quantity, price and rate impact of all energy efficiency and demand response measures purchased for electric utilities" (citing Section 3855/1-125 of the IPA Act) and the fact that under Section 8-103(i)[6] the IPA is authorized "to assume responsibility for implementing energy efficiency measures when ComEd and Ameren fail to meet the applicable efficiency standards," that a "clear mandate" exists for the IPA to procure energy efficiency beyond the circumstances of when a utility fails to meet to energy efficiency standards of Section 8-103. (IPA BOE, at 4-5) ELPC/NRDC simply make the argument that the IPA Act, which requires the IPA to report on "quantity, price, and rate impact of all energy efficiency and demand response measures purchased for electric utilities" to the Governor and General Assembly, is persuasive evidence that the IPA has authority to purchase energy efficiency measures as part of its annual procurement plan. (ELPC/NRDC BOE, at 3) ELPC/NRDC conclude that "[i]t makes no sense that the IPA would be required to report on energy efficiency 'purchased for the utilities' if the legislature did not envision the IPA procuring efficiency." (ELPC/NRDC BOE, at 3) Staff

[5] See 16-111.5(a); (b)(3)(iv); (e)(5)(i); and (e)(5)(iii).

[6] The IPA cites to Section 8-103(e) in its BOE (IPA BOE, at 4); however, 8-103(e) does not refer at all to the IPA. Staff presumes the IPA meant to cite to Section 8-103(i). The IPA also cites to Section 8-103(f) in its BOE (Id., at 5) but there is no reference to the IPA in section 8-103(f). Staff presumes the IPA meant to cite to Section 8-103(i) again.

will respond to ELPC/NRDC first. ELPC/NRDC's argument simply fails to acknowledge the existence of section 8-103(i) of the PUA, which does allow the IPA to assume responsibility for procuring energy efficiency measures but only if the utilities fail to meet the energy efficiency standards after a certain period of time. Under those circumstances, the IPA is required to report to the Governor and General Assembly on the purchases of energy efficiency measures for utilities. Therefore the existence of that section of the law does not require one to assume as ELPC/NRDC suggest that the IPA has the general authority to purchase energy efficiency measures as part of its annual procurement plan. The IPA argues that the authority to purchase energy efficiency measures when utilities fail to meet the energy efficiency standards of Section 8-103(a) coupled with the reporting requirement to the Governor and General Assembly gives the IPA the specific authority to purchase energy efficiency as part of its annual procurement plan. (IPA BOE, at 4-5). Like ELPC/NRDC the IPA ignores the plain language of the statute that the authority to purchase energy efficiency measures is limited to certain circumstances and those circumstances are only when the utilities fails to meet the standards of Section 8-103 and the IPA then assumes the utilities' responsibilities under Section 8-103(i). When those circumstances exist, and when the IPA purchases energy efficiency measures under those circumstances, the IPA is then to report to the Governor and General Assembly.

Finally, the AG makes an argument that the legislative declarations and findings section of the IPA Act show a clear intent by the legislature for the IPA to procure energy efficiency measures as part of its annual procurement plan. (AG BOE, at 15) To support this argument the AG cites to case law that "[a]lthough a policy section, cannot be used to create an ambiguity in a statute or ordinance, it may be used to clarify ambiguous

portions of an act. Triple A Services, Inc. v. Rice (citations omitted)." (AG BOE, at 14) The AG then argues that the legislative declarations and findings sections of the IPA Act demonstrate the intent by the legislature for the IPA to procure energy efficiency measures as part of the annual procurement plan. (Id., at 15) Staff's response to the AG is as follows. First, the AG's argument ignores the simple fact that there is no ambiguity in the law in the relevant sections of the PUA and the IPA Act. Second, the AG does not identify which sections of the IPA Act or PUA it believes are ambiguous. If the AG is referring to section 5/16-115.5(d)(2), that section is not ambiguous. As discussed by Staff previously in this RBOE, pursuant to 5/16-111.5(d)(2) of the PUA, the portfolio of products to be included in the IPA's Plan is limited to demand response products and power and energy products, (220 ILCS 5/16-111.5(d)(2)), and section 1-75(a) of the IPA Act provides that procurement plans are to be in compliance with Section 16-111.5 of the PUA. Surely the Commission would agree with Staff that energy efficiency products are not listed as a product that is allowed to be purchased by the IPA. Third, despite an implied claim that it is not using a policy section to create ambiguity in a statute to the contrary, the AG is doing exactly that. The AG is simply claiming that an unspecified section of the act is ambiguous because it allegedly contradicts a policy section of the IPA Act and then uses the same policy section to clarify unspecified "ambiguous portions" of the act in order to support its position that the IPA has authority to include energy efficiency measures in its procurement plan. (AG BOE, at 15) The Commission should reject the AG's argument.

For all of the above reasons the Commission should reject the IPA's, AG's and ELPC/NRDC's exceptions on this issue.

C. Supplier Collateral Thresholds (VII., D.)

The ComEd BOE states:

> The PO's acceptance of the Plan's proposal to change the process for establishing collateral amounts is unwarranted…The PO identifies no reason to remove this contract term from the process prescribed by the PUA.

(ComEd BOE, at 11.) To the contrary, the IPA Plan does not change the process for establishing collateral amounts that the PUA prescribes. The IPA Plan specifies that collateral thresholds may change from the levels used in the utilities' existing contracts, provided there is consensus among the utilities, the administrators, the monitor and Staff that a compelling reason warrants new collateral threshold amounts. (IPA Plan, at 16.) The IPA Plan does nothing more than establish a reasonable standard for revising the unsecured credit limits that ComEd has adopted for the past two procurement cycles. Staff considers the IPA Plan's language to be reasonable because even though balancing risk allocation between utilities and suppliers may be more art than science, it should not be arbitrary.

Staff disagrees with the ComEd BOE that adopting the IPA Plan's language on collateral thresholds "sets a very dangerous precedent by inviting all parties to bring their contract issues into the procurement plan proceeding to have those issues resolved by litigation rather than negotiation, as envisioned by the PUA." (ComEd BOE, at 11.) To the contrary, the ALJPO confirms that the IPA Plan "merely provides a starting point and notes the IPA remains open to negotiating threshold levels with the administrator, monitor, bidders, utilities and Staff." (ALJPO, at 86.)

Finally, existing ComEd energy supply contracts provide the same unsecured credit limit for a given credit ratings as the Ameren contracts. Uniform collateral

thresholds are consistent with the ALJPO, which endorses standardizing the utilities' contract provisions as much as possible. Specifically, the ALJPO states:

> The Commission supports efforts to standardize the procurement process as much as possible. For this reason, the Commission encourages the IPA, Procurement Administrator(s), and other stakeholders to work together toward that end. The IPA should consider using a RFP calling for a single application and guarantee for all products, with bidders indicating for what products they are applying and in what service territory(ies). Efforts to streamline and standardize contracts should also be seriously undertaken during the contract development stage of the process.

(ALJPO, at 109.)

For all the foregoing reasons, Staff continues to support the IPA Plan's language regarding collateral thresholds, which does not make any changes to the unsecured credit limits, but defines under what circumstances the procurement administrator may revise threshold levels from the levels used in existing contracts.

D. Multiple Procurement Cycles (VII, J.)

RESA proposes that, "in addition to soliciting written input from parties, the Commission Staff conduct workshops, beginning in January 2011, after the close of this proceeding, on the subject of multiple procurement events. If consensus cannot be reached, the Commission Staff should make a recommendation to the IPA well in advance of the submission by IPA of next year's draft procurement plan so that the IPA can give timely consideration to the inclusion of multiple procurement events in that plan." (RESA BOE at 16)

Staff agrees with RESA that the ALJPO erred when it merely stated that "Staff, including the ORMD, and others are free, however, to meet without being directed to do so by the Commission to discuss proposals for multiple procurement events in future

Plans." (ALJPO at 103) Staff agrees with RESA that such a direction is inadequate. In fact, it would likely contradict the ALJPO's statement immediately preceding it, when it states that "until a proper analysis of advantages and disadvantages is complete, the Commission is reluctant to support multiple procurement events." (ALJPO at 103) In Staff's view, soliciting written input from the parties and submitting a report to the IPA prior to the submission of next year's draft procurement plan is an appropriate way to conduct a proper analysis of advantages and disadvantages associated with multiple procurement events.

While Staff generally agrees with RESA's exception to this issue, Staff offers the following proposed language modifying the ALJPO on page 103:

> Providing customers with more accurate information regarding the actual cost of electricity is certainly a reasonable goal, but the Commission is concerned that using multiple procurement events to achieve this and other goals described by RESA is not appropriate at this time. As it stands, the record lacks any analysis of the disadvantages versus advantages of multiple procurement events. Staff raises legitimate concerns about whether holding more frequent events could reduce the amount of supplier participation and the degree of competition per procurement event. Administrative costs and burdens may increase as well. Therefore, until a proper analysis of advantages and disadvantages is complete, the Commission is reluctant to support multiple procurement events.To this end, ~~T~~the Commission directs the Office of Retail Market Development ("ORMD") to solicit written input on this matter, and Staff to prepare a report to be provided to the IPA prior to the publication of the IPA's next draft procurement plan. This report should include explicit recommendations on how, if at all, Staff would propose to enable customers to see a default price that better reflects market prices and will minimize long term contract hedging premiums that are associated with longer term contracts procured far in advance of delivery. ~~is also troubled by this proposal for an additional reason. As discussed elsewhere in this Order, the IPA is still attempting to complete the procurement set forth in Docket No. 09-0373. The Commission is not inclined to direct the IPA to conduct additional procurement events beyond what is necessary when it would appear be having difficulty (for whatever reason) implementing the last Plan. Moreover, it would be premature to require workshops in January 2011 to discuss multiple procurement events in light of the difficulties with the last Plan. Staff, including the ORMD, and others are free, however, to meet without being directed to do so by the Commission to discuss proposals for multiple procurement events in future Plans.~~

III. CONCLUSION

Staff respectfully requests that the Illinois Commerce Commission approve Staff's recommendations in this docket.

Respectfully submitted,

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